

barrassment depends upon the kind of proof required as to acts of the foreign government. The position of the court in the instant case, requiring proof of the particular governmental acts upon which the foreign government's assertion of title was based and refusing to adopt the statement of the accredited representative of the foreign government as conclusive proof of the fact that the foreign government has executed those acts, may cause serious embarrassment. This approach imposes on the United States the almost impossible task of determining, before purchasing, what acts took place in the foreign state and of obtaining sufficient proof of the acts to satisfy a domestic court. Such an inquiry might affront the foreign government. Moreover, since acts of a foreign government need not be even "colorably valid,"<sup>17</sup> and since, therefore, any acts claimed by the foreign government to be sufficient to pass title have that effect, it would seem that the "acts" themselves become irrelevant. For instance, where the foreign government's acts take the form of a secret decree transferring title to it, proof of governmental acts ultimately depends on statements of government officials. The only effect of the requirement of proof of the particular acts would be to change the result of a case in which proof of the acts is not possible. If the foreign government is no longer in existence, as was almost the situation in the instant case, it may be impossible to obtain proof of any "acts" of the government.

It appears to be preferable, then, for courts to accept the statement of the representative of the foreign government as conclusive. An analogy is found in an English case<sup>18</sup> in which, when the diplomatic immunity of an alleged member of a foreign mission was in question, it was held that a statement by the foreign office was conclusive. Even if this rule were adopted in cases involving purchase by the government, it would not necessarily be applicable to cases involving purchases by private persons. In the latter cases, embarrassment to the United States in the conduct of foreign affairs is more remote and can arise only if the foreign government takes offense at the domestic court's decision and makes diplomatic representations. But even here, judicial interference violates the foreign government's immunity from suit by compelling it to defend its actions in court<sup>19</sup> and injures the market for its property.<sup>20</sup>

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**Labor Law—National Labor Relations Act—Employer Required to Embody Collective Bargaining Agreements in Writing—[Federal].**—The petitioner, an employer, having arrived at an accord as to wages, hours, and conditions of work with the col-

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transfer of claims to such assets to the United States government. *Confiscation and Corporations in Conflict of Laws*, 5 Univ. Chi. L. Rev. 280 (1938); *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938). A similar problem now exists with respect to Dutch, Danish, Norwegian, Belgian and Latvian assets being held by American banks. See *The Chase Wants to Know*, 37 Time, No. 7, at 57 (Feb. 10, 1941).

<sup>17</sup> 114 F. (2d) 438, 444 (C.C.A. 2d 1940). In *Princess Paley Olga v. Weisz*, [1929] 1 K.B. 718 (C.A.), the original seizure of the property was by local soviets without authority from a government, but the Soviet Government later ratified the seizure.

<sup>18</sup> *Musmann v. Engelke*, [1928] 1 K.B. 90 (C.A.) (statement of foreign office conclusive as to diplomatic status of member of Germany Embassy staff).

<sup>19</sup> *The Jupiter* (No. 2), [1925] Prob. 69; *The Jupiter* (No. 3), [1927] Prob. 122; *The Jupiter* (No. 3), [1927] Prob. 250 (C.A.) (Soviet Russia defended its title for purchaser of property).

<sup>20</sup> See note 10 *supra*.

lective bargaining representative for its employees, refused to sign a written agreement. The National Labor Relations Board, in an unfair labor practice proceeding, ordered the employer to sign an agreement embodying the terms reached with the union. On certiorari from the United States Supreme Court to review a judgment of the Circuit Court of Appeals for the Sixth Circuit upholding the board's order,<sup>1</sup> held, that refusal to sign a written agreement constituted a refusal to bargain collectively and an unfair labor practice under the act,<sup>2</sup> and that the board might require a signed agreement where the union had so requested. Judgment affirmed. *H. J. Heinz Co. v. NLRB*.<sup>3</sup>

The principal case ends the uncertainty resulting from conflicting holdings among the circuit courts of appeals as to whether the National Labor Relations Act requires an employer to sign a written contract.<sup>4</sup> The conclusion that the signing of a written agreement is not required was considered to follow from the fact that the employer was not obligated by the act to agree, the only requirement being that he bargain in good faith.<sup>5</sup> In the principal case the Supreme Court rejected this contention, and pointed out that it does not follow from the employer's freedom not to agree that he may refuse to embody his voluntary agreement in writing. The Court found that written agreements were intended by Congress, inasmuch as they are an essential part of collective bargaining. In so holding, the Court relied on evidence showing that written trade agreements were the general rule in collective bargaining,<sup>6</sup> and that they were necessary to preserve the collective bargaining right itself.<sup>7</sup> It was further found that Congress intended to incorporate into the act the experience gained in administering the similar provisions of the Railway Labor Act<sup>8</sup> and the National Industrial Recovery Act.<sup>9</sup> The National Mediation Board, under the authority of the former of these acts, had considered written agreements essential to collective bargaining;<sup>10</sup> under the

<sup>1</sup> *H. J. Heinz Co. v. NLRB*, 110 F. (2d) 843 (C.C.A. 6th 1940).

<sup>2</sup> National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C.A. § 151 et seq. (Supp. 1940).

<sup>3</sup> 61 S. Ct. 320 (1941).

<sup>4</sup> Six of the circuits had taken the position reached in the principal case. *Bethlehem Shipbuilding Corp. v. NLRB*, 114 F. (2d) 930 (C.C.A. 1st 1940); *Art Metals Construction Co. v. NLRB*, 110 F. (2d) 148 (C.C.A. 2d 1940); *NLRB v. Highland Park Mfg. Co.*, 110 F. (2d) 632 (C.C.A. 4th 1940); *H. J. Heinz Co. v. NLRB*, 110 F. (2d) 843 (C.C.A. 6th 1940); *Wilson & Co. v. NLRB*, 115 F. (2d) 759 (C.C.A. 8th 1940); *Continental Oil Co. v. NLRB*, 113 F. (2d) 473 (C.C.A. 10th 1940), cert. granted 61 S. Ct. 72 (1940). *Contra: Inland Steel Co. v. NLRB*, 109 F. (2d) 9 (C.C.A. 7th 1940); *Fort Wayne Corrugated Paper Co. v. NLRB*, 111 F. (2d) 869 (C.C.A. 7th 1940).

<sup>5</sup> See *Globe Cotton Mills v. NLRB*, 103 F. (2d) 91, 94 (C.C.A. 5th 1939); *NLRB Ann. Rep.*, at 82 (1937).

<sup>6</sup> Yoder, *Labor Economics and Labor Problems* 499 (1933); *NLRB Division of Economic Research, Written Trade Agreements in Collective Bargaining* 16 (1939).

<sup>7</sup> See *Art Metal Construction Co. v. NLRB*, 110 F. (2d) 148, 150 (C.C.A. 2d 1940).

<sup>8</sup> 44 Stat. 577 (1926), amended by 48 Stat. 1185 (1934), 45 U.S.C.A. § 151 (Supp. 1940).

<sup>9</sup> 48 Stat. 195 (1933). "... the Bill is merely an amplification and further clarification of the principles enacted into law by the Railway Labor Act and by section 7 (a) of the National Industrial Recovery Act, with the addition of enforcement machinery of familiar pattern." *H.R. Rep.* 1147, at 374th Cong. 1st Sess. (1935).

<sup>10</sup> National Mediation Board *Ann. Rep.*, at 1, 36 (1935).

NRA, although refusal to sign was held not necessarily in violation of the law, it was considered as evidence showing denial of the right of collective bargaining.<sup>11</sup> This method of including in the concept of collective bargaining the requirement of written agreements suggests that other historically well-established aspects of collective bargaining may be similarly insisted upon.<sup>12</sup>

It might be argued, nevertheless, that this decision does not cover the dissimilar factual situation of *Inland Steel Co. v. NLRB*,<sup>13</sup> where the employer had stated from the opening of negotiations that he did not intend to sign an agreement. But the distinction between the employer's announcing that he will refuse to sign if an agreement should be reached, as in the *Inland Steel* case, and his refusal to sign after agreement has been reached, as in the principal case, should prove of no significance. In both instances the employer is indicating that he does not intend to fulfill his statutory duties. Consequently, refusal to sign may well be considered a decisive indication of lack of good faith by the employer. Several of the decisions are based at least in part on this ground.<sup>14</sup>

It would seem beyond question that written trade agreements are preferable to oral agreements, if only from the standpoint of good business practice. Employers refusing to sign have frequently posted bulletins outlining the terms of agreement, but such announcements seldom mention the union or indicate that the terms were reached through negotiation. The practice therefore amounts to a failure fully to recognize the union,<sup>15</sup> and its consequences may be loss of union prestige and weakening of union organization. Since the decision in the principal case prohibits the use of this device, it is to be expected that some employers will now endeavor to avoid agreements altogether, whether written or not, by relying literally on the ruling that they need only bargain in good faith.

For this reason it is difficult to assess the importance of the principal case, and much depends upon the effectiveness of the board's enforcement of the "good faith" requirement. What constitutes good faith in collective bargaining has already been the subject of numerous court and board decisions, but many of these deal with rather flagrant indications of bad faith.<sup>16</sup> As employers realize the futility of practices considered by

<sup>11</sup> Lorwin and Wubnig, *Labor Relations Boards* 312 (1935).

<sup>12</sup> It was early decided that wages, hours, and conditions of work are the proper subjects of collective bargaining negotiations. *Atlantic Refining Co.*, 1 N.L.R.B. 359 (1936). See Wolf, *The Duty to Bargain Collectively*, 5 *Law & Contemp. Prob.* 242, 248 (1938). An employer might be compelled to sign an agreement of longer duration than he desired on the ground that only an agreement of such duration would be consistent with collective bargaining. The term of most collective agreements is in fact one year. Yoder, *Labor Economics and Labor Problems* 499 (1933). So far the board has regarded the question of duration as a matter for negotiation between the parties. NLRB Ann. Rep., at 86 (1937).

<sup>13</sup> 109 F. (2d) 9 (C.C.A. 7th 1940).

<sup>14</sup> NLRB v. Highland Park Mfg. Co., 110 F. (2d) 632 (C.C.A. 4th 1940); *Wilson & Co. v. NLRB*, 115 F. (2d) 759 (C.C.A. 8th 1940); cf. *H. J. Heinz Co. v. NLRB*, 110 F. (2d) 843, 849 (C.C.A. 6th 1940). This was the holding of the board in *Inland Steel Co.*, 9 N.L.R.B. 783, 801 (1938), rev'd sub nom. *Inland Steel Co. v. NLRB*, 109 F. (2d) 9 (C.C.A. 7th 1940).

<sup>15</sup> Cf. *NLRB v. Griswold Mfg. Co.*, 106 F. (2d) 713 (C.C.A. 3d 1939).

<sup>16</sup> *NLRB v. Somerset Shoe Co.*, 111 F. (2d) 681 (C.C.A. 1st 1940); *Jeffery-De Witt Insulator Co. v. NLRB*, 91 F. (2d) 134 (C.C.A. 4th 1937), cert. den. 302 U.S. 731 (1937); *Lady Ester Lingerie Corp.*, 10 N.L.R.B. 518 (1938); *Charles J. Stein*, 14 N.L.R.B. 667 (1939);

the courts to be indicative of bad faith, the difficulty of determining good faith will correspondingly increase. "Good faith" does not require that the employer take the initiative,<sup>17</sup> but it does demand that he negotiate with a mind open to persuasion<sup>18</sup> and with the intention of reaching an accord if possible.<sup>19</sup> The difficulty of applying this criterion is especially apparent with respect to counterproposals.<sup>20</sup> The employer need not submit counterproposals on his own initiative,<sup>21</sup> but if requested he should suggest terms.<sup>22</sup> The nature and the manner of presentation of such terms are central in determining intent.<sup>23</sup> Thus, if the employer demonstrates during negotiations that he regards his initial position as his final one, despite repeated union concessions, his compliance with the formalities of bargaining may not suffice.<sup>24</sup>

It is possible that the difficulty of enforcing the "good faith" requirement<sup>25</sup> will permit circumvention of the decision in the principal case. Nevertheless, strong unions will be able to compel the acceptance of some terms by the employer; it is important that they now can compel the embodiment of these terms in signed agreements.

cf. *The Solvay Process Co.*, 3 C.C.H. Lab. Law Serv. ¶ 60,208 (1941); *NLRB v. Hopwood Retinning Co.*, 98 F. (2d) 97 (C.C.A. 2d 1938).

<sup>17</sup> *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939).

<sup>18</sup> See *Globe Cotton Mills v. NLRB*, 103 F. (2d) 91, 94 (C.C.A. 5th 1939); *NLRB v. Griswold Mfg. Co.*, 106 F. (2d) 713, 723 (C.C.A. 3d 1939).

<sup>19</sup> The purpose of the act is to compel collective bargaining to the end that trade agreements may be made. See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 342 (1939).

<sup>20</sup> The board has considered the employers' willingness to make counterproposals an important indication of good faith. *NLRB Ann. Rep.*, at 97 (1938); cf. *Adams Brothers Manifold Printing Co.*, 17 N.L.R.B. 974, 980 (1939). The board's position was pointedly criticized by the committee investigating the labor board (Smith Committee). Final Report of the House of Representatives Committee to Investigate the NLRB 474-75, 76th Cong. 1st Sess. (Bureau of Nat'l Affairs, Dec. 28, 1940).

<sup>21</sup> *NLRB v. Express Publishing Co.*, 111 F. (2d) 588 (C.C.A. 5th 1940), cert. granted 61 S. Ct. 134 (1940).

<sup>22</sup> See *Globe Cotton Mills v. NLRB*, 103 F. (2d) 91, 94 (C.C.A. 5th 1939). Compare *Kellogg Switchboard & Supply Co.*, 1 C.C.H. Lab. Law Serv. ¶ 6199 (1941) with *Easton Publishing Co.*, 19 N.L.R.B. No. 43 (1940). But were counterproposals required of employers in all cases, the unions, by accepting, could always secure immediate agreements. Ward, *The Mechanics of Collective Bargaining*, 53 Harv. L. Rev. 754, 773 (1940).

<sup>23</sup> See *NLRB v. Hopwood Retinning Co.*, 98 F. (2d) 97, 101 (C.C.A. 2d 1938). Rosenfarb, *The National Labor Policy* 204 (1940).

<sup>24</sup> See *P. Lorillard Co.*, 16 N.L.R.B. 684 (1939), where the employer's action in repeating the same counterproposal convinced the board that he was not open to persuasion and was substituting for collective bargaining a process amounting to unilateral formulation of terms. The circuit court of appeals thought differently. *NLRB v. P. Lorillard Co.*, 3 C.C.H. Lab. Law Serv. ¶ 60,289 (C.C.A. 6th 1941). This case thus serves as an excellent illustration of the difficulties of determining what constitutes good faith. Cf. *NLRB v. Express Publishing Co.*, 111 F. (2d) 588, 589 (C.C.A. 5th 1940), cert. granted 61 S. Ct. 134 (1940). See Ward, *The Mechanics of Collective Bargaining*, 53 Harv. L. Rev. 754, 772 (1940).

<sup>25</sup> "The indicia of good faith are notoriously elusive. . . ." *S. L. Allen & Co.*, 1 N.L.R.B. 714, 727 (1936). Nevertheless the board has enforced this requirement in fairly close cases. See *Sigmund Freisinger*, 10 N.L.R.B. 1043 (1939); *Dallas Cartage Co.*, 14 N.L.R.B. 411 (1939); *Knoxville Publishing Co.*, 12 N.L.R.B. 1209 (1939).